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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 BUNGIE, INC.,

7 Plaintiff,

8 v.

9 AIMJUNKIES.COM, et al.,

10 Defendants.

C21-0811 TSZ

ORDER

11 THIS MATTER comes before the Court on the deferred portion of Plaintiff
12 Bungie, Inc.’s motion for summary judgment, docket no. 156; *see also* Minute Order
13 (docket no. 193) (denying in part and deferring in part Bungie, Inc.’s motion for
14 summary judgment). Having reviewed all papers filed in support of, and in opposition to,
15 the motion, the Court enters the following Order.

16 **Background**

17 The parties and Court are already familiar with the facts of this case.¹ Given this
18 familiarity, the Court will outline only the facts and procedural history relevant to the
19 counterclaims of Defendants James May and Phoenix Digital Group
20 LLC (“Phoenix Digital”).

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22 ¹ *See* Order (docket no. 50) (granting Bungie, Inc.’s motion for preliminary injunction); Order (docket no.
23 71) (granting Bungie Inc.’s motion to dismiss); Order (docket no. 140) (confirming arbitration award).

1 Plaintiff Bungie, Inc. (“Bungie”) owns copyrights for software and audiovisual
2 works related to *Destiny 2* and *Destiny 2: Beyond Light* (collectively, “*Destiny 2*”).
3 Exs. 2–5 to Rava Decl. (docket no. 160 at 9–20). This case arises out of distribution of
4 Cheat Software for *Destiny 2*. The Cheat Software provided purchasers with features not
5 normally available in Bungie’s *Destiny 2*, giving them an advantage over non-cheating
6 players. Am. Compl. at ¶¶ 81, 86, 89 (docket no. 34); Am. Answer at ¶¶ 81, 86, 89
7 (docket no. 72). Purchasers of the Cheat Software would download a copy of a Loader
8 Software. Guris Expert Report at ¶¶ 97–99, Ex. 6 to Rava Decl. (docket no. 160 at 21–
9 53); Schaefer 2022 Dep. Tr. at 92:18–93:6. The Loader Software would then connect to
10 a third-party server and “inject” the Cheat Software into the user’s session of *Destiny 2*.
11 Guris Expert Report at ¶¶ 97-98; Schaefer 2022 Dep. Tr. at 101:25–102:10.

12 Phoenix Digital admits to distributing the Cheat Software. Resp. at 4 (docket
13 no. 177). Bungie has also named as defendants in this action Jeffrey Conway, Jordan
14 Green, and David Schaefer. Although Conway, Green, and Schaefer could each exercise
15 full managerial power over Phoenix Digital, (Phoenix Digital Group LLC Agreement at
16 § 4.3 & Schedule A, Ex. 7 to Rava Decl. (docket no. 161), they each had their own
17 responsibilities. Conway generally handled the finances. Conway 2022 Dep. Tr. at
18 22:2–19, Ex. 8 to Rava Decl. (docket no. 162). Green generally handled the website
19 design and hosting work. Green 2022 Dep. Tr. at 38:24–39:6, Ex. 9 to Rava Decl.
20 (docket no. 162). Schaefer generally acted as the business manager. Schaefer 2022 Dep.
21 Tr. at 14:12–15:15, Ex. 10 to Rava Decl. (docket no. 164). May is an independent
22 contractor who develops cheats for Phoenix Digital and AimJunkies.com. May 2022
23

1 Dep. Tr. at 13:8–23, Ex. 11 to Rava Decl. (docket no. 165); May 2023 Dep. Tr. at 9:11–
2 18, Ex. 31 to Rava Decl. (docket no. 160 at 242–354).

3 Prior to bringing the case, Bungie purchased a copy of the Cheat Software in
4 January 2020. Doe Dep. Tr. at 37:5–15, Ex. 26 to Rava Decl. (docket no. 168). As part
5 of that purchase, Defendants allege Bungie would have had to accept Phoenix Digital’s
6 Terms of Service (“the Terms of Service”). Am. Countercls. at ¶¶ 63–64 (docket no. 72).
7 Phoenix Digital alleges Bungie breached the Terms of Service by decompiling, reverse
8 engineering, or otherwise inspecting the Cheat Software’s programming. *Id.* at ¶¶ 73–74.
9 Phoenix Digital alleges a breach of contract counterclaim against Bungie for this
10 purported breach of the Terms of Service. *Id.* at ¶¶ 61–75.

11 As part of operating *Destiny 2*, Bungie would investigate reports of cheating and
12 ban cheaters and cheat developers from the videogame. Kaiser Decl. ¶ 24 (docket
13 no. 158 at 1–8). May was repeatedly caught and banned by Bungie for connecting
14 reverse engineering tools to *Destiny 2*. *Id.* at ¶ 25. May admitted to attempting to reverse
15 engineer *Destiny 2*’s programming and, when caught and banned for doing so, to creating
16 new accounts to regain access to the videogame. May 2022 Dep. Tr. at 41:14–42:2,
17 73:1–74:19, 85:5–7. When May would connect reverse engineering software to *Destiny*
18 *2* or run other programs simultaneously with *Destiny 2*, Bungie would record certain
19 metadata, including file names, from his computer. Kaiser Decl. ¶ 25; Ex. 1 to Kaiser
20 Decl.² (docket no. 158 at 9–12) (chart of the metadata recorded). To gain access to
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22 ² A review of the exhibits attached to Dr. Kaiser’s declaration shows that Exhibits 1 and 2 were cross-
23 labeled such that what ¶ 24 identifies as Exhibit 1 is actually attached to the declaration as Exhibit 2, and

1 *Destiny 2*, May was required to agree to Bungie’s Limited Software License Agreement
2 (“LSLA”) and Bungie’s Privacy Policy. Am. Countercls. at ¶¶ 6–8; Bungie’s Answer at
3 ¶¶ 6–8 (docket no. 90); May 2023 Dep. Tr. at 172:6–173:23. Under the Privacy Policy,
4 Bungie can collect, *inter alia*, device data such as IP addresses and device IDs from a
5 computer running *Destiny 2*. Privacy Policy at § 2.b. (docket no. 72-2 at 4). May alleges
6 that Bungie’s access to, and collection of data from, his computer constituted violations
7 of the Computer Fraud and Abuse Act (“CFAA”). Am. Countercls. at ¶¶ 37, 44, 51.
8 May further alleges that Bungie accessed files on his computer without his authorization
9 in violation of the Digital Millennium Copyright Act (“DMCA”). *Id.* at ¶¶ 56–60.

10 **Discussion**

11 **A. Summary Judgment Standard**

12 The Court shall grant summary judgment if no genuine issue of material fact exists
13 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).
14 The moving party bears the initial burden of demonstrating the absence of a genuine issue
15 of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material if
16 it might affect the outcome of the suit under the governing law. *Anderson v. Liberty*
17 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the
18 adverse party must present affirmative evidence, which “is to be believed” and from
19 which all “justifiable inferences” are to be favorably drawn. *Id.* at 255, 257. When the
20 record, taken as a whole, could not, however, lead a rational trier of fact to find for the

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22 what ¶ 25 identifies as Exhibit 2 is actually attached as Exhibit 1. The Court refers to the Exhibits in the
23 order that they are actually attached to Dr. Kaiser’s declaration.

1 non-moving party on matters as to which such party will bear the burden of proof at trial,
2 summary judgment is warranted. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
3 475 U.S. 574, 587 (1986); *see also Celotex*, 477 U.S. at 322.

4 **B. May's Counterclaims**

5 **1. May's Computer Fraud and Abuse Act Counterclaims**

6 May alleges three violations of the CFAA against Bungie. Am. Countercls. at
7 ¶¶ 37, 44, 51. The CFAA creates a private right of action. 18 U.S.C. § 1030(g). To
8 bring an action under the CFAA, the underlying conduct must involve “loss to 1 or more
9 persons during any 1-year period ... aggregating at least \$5,000 in value.”³ *Id.* at
10 § 1030(g); *id.* at § 1030(c)(4)(A)(i)(I). “Loss” is defined as “any reasonable cost to any
11 victim, including the cost of responding to an offense, conducting a damage assessment,
12 and restoring the data, program, system, or information to its condition prior to the
13 offense, and any revenue lost, cost incurred, or other consequential damages incurred
14 because of interruption of service.” *Id.* at § 1030(e)(11).

15 Bungie contends that May has not sustained the minimum of \$5,000 in aggregate
16 loss needed to sustain his CFAA counterclaims. In response, May relies solely on his
17 sworn affidavit for the contention that he “spent in excess of \$2702 purchasing new
18 computers and drives,” and approximately 40 hours of his time self-valued at \$75 per
19 hour in responding to Bungie’s allegedly improper access. May Decl. at ¶ 16 (docket
20 no. 175). A non-movant, however, cannot rely solely on conclusory, self-serving

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22 ³ 18 U.S.C. § 1030(g) also creates private right of action for conduct involving the factors set forth in 18
23 U.S.C. §§ 1030(c)(4)(A)(i)(II)-(V), which are clearly inapplicable to this case.

1 affidavits to create a genuine issue of material fact. *F.T.C. v. Publ’g Clearing House,*
2 *Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) (internal citations omitted); *see F.T.C. v.*
3 *Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) (“A non-movant’s bald assertions or a
4 mere scintilla of evidence in his favor are both insufficient to withstand summary
5 judgment.” (internal citation omitted)).

6 Bungie, by comparison, points to May’s own sworn deposition testimony. At his
7 deposition, May testified that his computer’s processor was not corrupted by Bungie’s
8 alleged access and was still useable. May 2023 Dep. Tr. at 110:13–20. He testified that
9 his video card was not damaged as a result of Bungie’s alleged access and was still
10 useable. *Id.* at 111:15–112:3. May also testified that his computer’s RAM, *id.* at 113:12–
11 18, his computer’s SSD drive, *id.* at 120:3–8, his computer’s motherboard, *id.* at 120:18–
12 121:9, his computer’s power supply, *id.* at 124:10–21, his three computer monitors, *id.* at
13 121:13–24, his keyboard, *id.* at 122:7–17, and his mouse, *id.* at 123:19–124:5, were all
14 undamaged by and still useable after Bungie’s allegedly improper access.⁴ Indeed, May
15 still has the “old computer” allegedly accessed by Bungie. *Id.* at 110:23–25, 114:5–8.
16 Even if an act falls within the scope of the CFAA, May “nevertheless is required to show
17 that [he] suffered a harm recognized by the statute.” *Doyle v. Taylor*, No. CV-09-158,
18 2010 WL 2163521, at *3 (E.D. Wash. May 24, 2010) (quoting *SKF USA, Inc. v.*
19 *Bjerkness*, 636 F. Supp. 2d 696, 721 (N.D. Ill. 2009)). The Court concludes as a matter

21 ⁴ May testified that he only replaced these items because he had been “hardware ID banned” by Bungie.
22 May 2023 Dep. Tr. at 126:6–24. He further testified, however, that he had consented to Bungie collecting
23 device identification information when he agreed to Bungie’s LSLA and Privacy Policy. *Id.* at 172:6–
173:23. Bungie acting in accordance with its LSLA based on data it was contractually allowed to collect
cannot cause a “loss” for CFAA purposes.

1 of law that purchasing replacements for undamaged computer components falls outside
2 18 U.S.C. § 1030(e)(11)'s definition of "loss." *See Doyle*, 2010 WL 2163521, at *2
3 (concluding that, in order to sustain a CFAA claim, a plaintiff who alleged that a
4 defendant accessed a USB drive and retrieved a confidential document would "have to
5 show that the thumb drive itself was somehow damaged or impaired by Defendant's act
6 of accessing the drive").

7 Bungie further contends that May's "claim that he spent 40 hours reviewing and
8 cleaning his files is dubious at best and lacks evidentiary support." Mot. at 28 (docket
9 no. 156). In response, May points to his own deposition testimony to support his
10 contention that he spent 40 hours repairing his computer. At his deposition, May testified
11 that he has no records of how much time he spent reviewing files after Bungie's allegedly
12 improper access. May 2023 Dep. Tr. at 87:14–16. Further, he testified that of the
13 estimated 40 hours spent responding to the alleged access, only approximately 25 hours
14 were actually spent reviewing potentially compromised files. *Id.* at 87:4–13. The
15 remaining approximately 15 hours were spent building a new computer. *Id.* As the
16 Court previously concluded, replacing undamaged computer components does not
17 constitute loss for CFAA purposes. Thus, it follows that assembling the non-loss
18 components into a new computer does not constitute loss. In short, the computer
19 components purchased by May and his time spent assembling those components into a
20 new computer do not constitute loss under the CFAA. The loss May incurred
21 remediating any harm from Bungie's allegedly improper access is, at most, the time he
22 spent reviewing any files that might have been compromised. Based on May's
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1 testimony, the value of this time is \$1875 (25 hours of time at \$75 an hour).

2 Consequently, May has not presented evidence sufficient to create a dispute of material
3 fact as to whether he sustained at least \$5,000 in damage as a result of Bungie’s allegedly
4 improper access. Accordingly, Bungie’s motion for summary judgment is GRANTED as
5 to May’s CFAA counterclaims. May’s CFAA counterclaims are DISMISSED with
6 prejudice.

7 **2. May’s Digital Millennium Copyright Act Counterclaim**

8 To prove his DMCA counterclaim, May must establish that he (1) employs
9 technological countermeasures, (2) to protect works subject to copyright protection, and
10 (3) that Bungie circumvented his technological countermeasures to access the protected
11 work. 17 U.S.C. § 1201(a)(1)(A). Bungie contends that May cannot establish that the
12 allegedly accessed works are subject to copyright protection and that Bungie
13 circumvented any technological countermeasures within the meaning of the DMCA.

14 **a. Copyright Protection**

15 Bungie contends that May cannot establish that the works on his computer were
16 subject to copyright protection. In response, May points to his sworn affidavit which
17 states that he owns copyrights in at least the “reclasskernel64.sys” and
18 “reclasskernel64.pdb” files. May Decl. at ¶¶ 3,8–9. May also testified at his deposition
19 that he owns copyrights in the “reclasskernel64.sys” file, May 2023 Dep. Tr. at 40:17–
20 41:1, and the “reclasskernel64.pdb” file, *id.* at 47:17–17, as well as the “blah64.exe” file,
21 *id.* at 23:15–18, and the “reclass.net.exe” file, *id.* at 34:19–21.

1 Bungie argues that because May has not produced copyright registrations for the
2 files he claims are subject to copyright protection, the fact that he created the files is not
3 enough to establish that they are subject to copyright protection. To support this
4 argument, Bungie relies solely on *Point 4 Data Corp. v. Tri-State Surgical Supply &*
5 *Equip. LTD*, No. 11-CV-726, 2013 WL 4409434 (E.D.N.Y. Aug. 2, 2013), *adopted in*
6 *relevant part*, 2013 WL 5502852 (E.D.N.Y. Oct. 1, 2013). In *Point 4*, the court
7 concluded that the plaintiff’s DMCA claim should be dismissed because it failed to
8 present sufficient evidence to create a genuine factual issue as to whether the underlying
9 software was copyrightable. *Id.* at *17–20. The *Point 4* court, however, had stricken
10 from the record the declaration that went to the copyrightability of the underlying
11 software, and was left with nothing but “an assumption” regarding the underlying
12 software’s copyrightability. *Id.* at *19. Here, by contrast, neither May’s declaration
13 testimony, May Decl. at ¶¶ 3, 8, nor his deposition testimony, May 2023 Dep. Tr. at
14 23:15–23, 34:19–25, 40:17–41:5, 47:15–22, that he created the code in the relevant files
15 and owns copyrights in them have been stricken from the record. The Court has evidence
16 in the record, and not just mere assumptions, that goes to whether the relevant files are
17 subject to copyright protection. Because “[t]he evidence of the non-movant is to be
18 believed, and all justifiable inferences are to be drawn in [May’s] favor,” *Anderson*, 477
19 U.S. at 255 (internal citation omitted), the Court concludes that issues of material fact
20 exist as to whether the relevant files are subject to copyright protection.

1 **b. Circumvention**

2 Bungie further argues that it did not circumvent any of May’s technological
3 countermeasures. May, however, testified that Bungie circumvented his password
4 protections when it accessed the file “reclasskernel64.sys.” May 2023 Dep. Tr. at
5 148:20–149:13. He testified that Bungie could have only accessed that file by bypassing
6 his password protections because it “never touches the Destiny process” and was stored
7 in a separate memory space on his computer. *Id.* Bypassing a password to access a file is
8 the type of circumvention the DMCA was intended to prevent. *See MDY Indus., LLC v.*
9 *Blizzard Ent., Inc.*, 629 F.3d 928, 947 (9th Cir. 2010). Considering May’s testimony, a
10 dispute of material fact exist as to whether Bungie circumvented any of May’s
11 countermeasures. The Court DENIES Bungie’s motion for summary judgment as to
12 May’s DMCA counterclaim.

13 **C. Phoenix Digital’s Breach of Contract Counterclaim**

14 **1. The Final Arbitration Award is Entitled to an Issue-Preclusive Effect**

15 Arbitration proceedings are entitled to an issue-preclusive effect.⁵ *Spivak v.*
16 *Alphabet Inc.*, No. C20-1480, 2021 WL 535211, at *7 (W.D. Wash. Feb. 12, 2021)
17 (citing *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992)). For issue
18 preclusion to apply “(1) the issue at stake must be identical to the one alleged in the prior
19 litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the
20 determination of the issue in the prior litigation must have been a critical and necessary

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22 ⁵ The Court uses the terms claim preclusion and issue preclusion in lieu of *res judicata* and collateral
23 estoppel, respectively. *See Robi v. Five Platters, Inc.*, 838 F.2d 318, 321 n.2 (9th Cir. 1998) (explaining
the preference for using the terms claim preclusion and issue preclusion).

1 part of the judgment in the earlier action.” *Id.* Whether the Cheat Software and Loader
 2 Software violated the DMCA, and whether they are illegal, was actually litigated in the
 3 Arbitration and was a necessary part of the Final Arbitration Award.⁶ *See* Final Arb.
 4 Award at 10–16 (docket no. 89-1). The Court therefore finds that the issue of the legality
 5 of the Cheat Software and Loader Software is entitled to an issue-preclusive effect.⁷

6 **2. The Terms of Service are Void as Illegal**

7 Phoenix Digital alleges that Bungie violated Phoenix Digital’s Terms of Service
 8 while conducting the investigation into the Cheat Software and Loader Software. Am.
 9 Countercls. at ¶¶ 73–75. Bungie contends that because the Arbitrator found the Cheat
 10 Software and Loader Software violated the DMCA, any contract pertaining to them is
 11 void as illegal. The Court agrees with Bungie.

12 “A contract that is illegal is void—that is, null from the beginning and
 13 unenforceable by either party.” *Bankston v. Pierce County*, 174 Wn. App. 932, 938, 391
 14 P.3d 495 (2013) (internal citations omitted). This principle holds true even if both parties
 15 knew of the illegality at the time of the contract’s formation. *Id.* at 938–39. As discussed

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 18 ⁶ Because the Court confirmed the Final Arbitration Award, docket no. 140, it is also entitled to
 19 preclusive effect as a final judgment of this Court. *NTCH-WA, Inc. v. ZTE Corp.*, 921 F.3d 1175, 1180
 20 (9th Cir. 2019) (“A federal-court order confirming an arbitration award has “the same force and effect”
 as a final judgment on the merits, 9 U.S.C. § 13, including the same preclusive effect.” (collecting cases));
see also Leaschauer v. Huerta, 667 F. App’x 253, 254 (9th Cir. 2016) (“[T]he preclusive effects of a
 lower court judgment cannot be suspended simply by taking an appeal that remains undecided.” (quoting
Robi, 838 F.2d at 327)).

21 ⁷ Defendants argue that this Court cannot give a claim-preclusive effect to the Final Arbitration Award
 22 because the Arbitration involved different claims than those now before the Court. Defendants are correct
 23 that the claims relevant to this motion are different than the claims in the Arbitration and, therefore, the
 Final Arbitration Award would not be entitled to a claim-preclusive effect. However, claim preclusion
 and issue preclusion, though similar, are distinct legal doctrines. *See Robi*, 838 F.2d at 321-22.

1 above, the Final Arbitration Award's finding that the Cheat Software and Loader
2 Software violated the DMCA is entitled to an issue preclusive effect. Because the Terms
3 of Service apply to the use of illegal goods, the Terms of Service are void as illegal and
4 unenforceable. Accordingly, the Court GRANTS Bungie's motion for summary
5 judgment as to Phoenix Digital's breach of contract counterclaim and DISMISSES
6 Phoenix Digital's breach of contract counterclaim with prejudice.

7 **Conclusion**

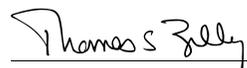
8 For the foregoing reasons, the Court ORDERS:

9 (1) The deferred portion of Plaintiff Bungie, Inc.'s motion for summary
10 judgment, docket no. 156, is GRANTED in part and DENIED in part. The motion is
11 GRANTED as to James May's CFAA counterclaims (First, Second, and Third Amended
12 Counterclaims of James May), and May's CFAA counterclaims are DISMISSED with
13 prejudice. The motion is further GRANTED as to Phoenix Digital Group LLC's breach
14 of contract counterclaim (First Amended Counterclaim of Phoenix Digital Group LLC),
15 and Phoenix Digital's breach of contract counterclaim is DISMISSED with prejudice.
16 The motion is DENIED as to May's DMCA counterclaim (Fourth Amended
17 Counterclaim of James May).

18 (2) The Clerk is directed to send a copy of this Order to all counsel of record.

19 IT IS SO ORDERED.

20 Dated this 16th day of October, 2023.

21
22 
23 Thomas S. Zilly
United States District Judge